FILE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 311

MURRAY B. McLEOD, Commissioner of Revenues of the State of Arkansas, Petitioner,

VS.

J. E. DILWORTH and RIECHMAN-CROSBY COMPANY, Respondents.

SEPARATE BRIEF FOR RESPONDENT, RIECHMAN-CROSBY COMPANY

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January 18, 1944.

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POINT I-a. ALL OF THE TRANSACTIONS HERE INVOLVED CONSTITUTE INTERSTATE COMMERCE, IN ITS VERY ESSENCE; AND TO TAX SUCH TRANSACTIONS, OR ANY INTEGRAL PART THEREOF, WOULD BURDEN THE COMMERCE.

POINT I-b. THE *BERWIND-WHITE* DECISION DOES NOT OVERRULE, OR IMPINGE UPON, PRINCIPLES DECLARED AND SETTLED IN THE *SONNEBORN CASE*, AND CASES OF SIMILAR IMPORT.

~~The transactions sought to be taxed in this case con-~~stitute interstate commerce. In view of the decision of this court in *Sonneborn vs. Cureton*, 262 U. S. 506, 43 Sup. Ct. 646, this proposition is not, and could not be, challenged. One of the categories of sales therein involved were sales of oil which, when sold, was not in Texas. Mr. Chief Justice Taft said:

> "Many of the sales by the appellants were made by them before the oil to fulfill the sales was sent to Texas. These were properly treated by the state authorities as exempt from taxation. They were in fact contracts for the sale and delivery of the oil across state lines. The soliciting of orders for such sales is equally exempt. Such transactions are interstate in its essence and any state tax upon it is a regulation of it and a burden upon it."

True it is that the tax officials in the *Sonneborn case* had not attempted to tax such interstate sales. Nevertheless their restraint was explicitly declared to be constitutionally imperative. We are further aware that in the majority opinion in the *Berwind-White Case* the quoted statement was called "obiter." Regardless thereof, however, it was seemingly made deliberately, had supporting authority and should be taken in connection with prior statements which afforded genuine protection to sales of like character.

In the *Sonneborn case*, the contract "for the sale and delivery of the oil across state lines" was made by seller in an established place of business in Texas. In the case at bar the contracts of sale were made in Tennessee, where the title to the merchandise passed and immediate delivery thereof, in one category actual, and in the other two constructive, was accomplished.

~~In~~ *~~Furst~~ vs. Brewster*, ~~282 U. S.~~ 493, 51 S. ~~C. 295, Mr.~~ Chief Justice Hughes, referred to and again approved the following language used by Judge Sanborn (Walter H., 8th C. C. A.):

> "All interstate commerce is not sales of goods. Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states, which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

Mr. Chief Justice Hughes further said:

> "Such commerce comprehends all the component parts of commercial intercourse between different states, and, according to established principle, any state statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the commerce clause."

In the *Furst case*, in pursuance of orders sent by Brewster, in Arkansas to Furst in Illinois, goods were shipped to the purchaser in Arkansas from the warehouse of Furst in Tennessee. Brewster failed to pay for the goods and Furst sued to recover on the contract. Brewster defended on the ground that the contract of sale was, in reality, made with a corporation which had not complied with an Arkansas statute relating to "doing business" by a foreign corporation in Arkansas, and, therefore, could not enforce the contract. Thereby, the commerce clause became involved. The Chief Justice, after stating, "these transactions were clearly in interstate commerce," further said:

> "Accordingly, when a corporation goes into a state other than that of its origin to collect, according to

the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the state cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose."

If an act of the state designed to prevent the enforcement of, or otherwise burdening, a transaction or contract protected by the commerce clause, be held invalid for that reason, then, seemingly, it would necessarily follow that any state tax, of whatsoever kind or character, laid on the right to complete, or any activity necessary to the completion of, the contract by delivery of the goods contracted to be sold, wheresoever, or howsoever, made, would likewise fall within the ban.

However, it is argued by counsel for petitioner that the tax here imposed by the state statute does not burden interstate commerce. He says:

> "It is apparent that in considering the taxes involved in this case, the question of their validity under the interstate commerce clause of the Federal Constitution depends upon whether the taxes, as levied, discriminate against or burden interstate commerce."

Reliance is placed on the decision of this court in *McGoldrick vs. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 Sup. Ct. 388. Of course, the opinion therein must be construed in the light of its factual setting. The facts are unrelated to, and wholly different from, the facts in the instant case.

Therein, the Coal Company maintained an established office in the City of New York, in which it conducted the

business of selling coal to customers within the city. Contracts of sale were negotiated at such office and obligated the seller to make deliveries of coal at the plants of the purchasers within the limits of the city. Every activity connected with the sales was conducted within the city, so that the taxable event occurred wholly within city limits. It was held that the fact that the coal company moved the coal in interstate transportation in order to bring it within the city for subsequent delivery under its contracts would not make the sale and delivery thereof within the city interstate commerce within the purview of the commerce clause.

In the case at bar neither the taxable event, nor any component part of it, occurred in Arkansas. To the very contrary, all of the contracts were made in Tennessee and were fully executed and performed in that state. In the *Riechman-Crosby case,* $87,230.99 of the sales involved were made on orders secured by traveling salesmen, or solicitors, of the company, subsequently accepted in Memphis, followed by deliveries to carrier, f. o. b. Memphis; $140,415.03 in sales originated by mail orders forwarded to Company, followed by acceptance and delivery to a common carrier in Memphis; and $13,669.69 of sales were made directly to residents of Arkansas, who drove trucks to the place of business of the Riechman-Crosby Company, purchased the goods, took actual possession thereof, and subsequently transported them into Arkansas in their own trucks. In each and all of such transactions, the title to, and possession of, the property passed to the purchaser in Memphis, thereby completing the sales transaction. Thereafter, the seller was no longer concerned in the transaction, and became entirely disassociated from it before the goods ever crossed the state

line into Arkansas. These conceded facts place the case at bar entirely beyond and without the purview of the *Berwind-White* decision.

Petitioner contends, however, that the sales so made were in reality made to citizens in Arkansas, and that the sales contracts contemplated an interstate movement of the goods out of Tennessee into Arkansas. It is further contended that the delivery of the goods by the common carrier to the purchaser in Arkansas was, under the statute, a component part of the taxable event, so as to bring the transaction within the terms of the Arkansas statute.

The *Berwind-White* case should neither be construed or applied, as counsel seeks to have done, by lifting from the context of the majority opinion the statement that, "the tax is conditioned upon a local activity * * * delivery of the goods within the state upon their purchase for consumption." The quoted statement provides neither the corner stone for, or foundation of, the decision. To so apply it is to distort the substance of it. To the very contrary, the basic facts, other statements in the opinion, and, more especially, express recognition of that provision of the enabling act itself requiring that both the order for the goods and subsequent delivery thereof must take place within the city limits form the predicate for the conclusion reached and show that the decision is confined to sales which are the product of both agreements and deliveries made within the taxing limits. Otherwise, the very plain restrictive limits of the enabling act that it "shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of the city, notwithstanding that some act be necessarily performed with respect to such trans-

action within such limits," (thus requiring that both the order for goods and the subsequent delivery thereof must occur within the taxing area) must be utterly disregarded and thrown into the discard. If, as counsel argues, the taxable event was delivery in the city, after termination of the interstate journey, and it was this sole activity which conditioned the tax, why the necessity for reciting the facts showing maintenance of a place of business within the city, the making of the contracts therein, and the *agreement* to make delivery therein? Moreover, and regardless of how one may speculate or anticipate what should, or may, be now decided in the circumstances here presented, where the state seeks to apply a tax to a delivery in pursuance of a contract of sale and purchase made and fully consummated in a sister state, nevertheless, we yet contend, with some degree of assurance, that the *Berwind-White case* did not involve, and is not decisive of, that particular question, and, therefore, prior decisions are of controlling force.

There are two answers to counsel's contention that the taxable event is delivery of the goods to the purchasers in Arkansas. The first is that the sales contracts were made in Tennessee, were fully consummated therein and the title of the goods there passed to the purchasers, on actual delivery to *him*, or his carrier agent. This, of course, raises the question of the extra-territorial application of the Arkansas statute. However, the Supreme Court of Arkansas did not pass on this question and this court is not presently concerned with it.

The second answer is that if delivery by the carrier to the consignee in Arkansas be treated as a component part of the sales transaction, thereby giving the trans-

action an interstate character, then the taxing statute imposes an undue burden on interstate commerce in violation of the commerce clause. For the purpose of this question, it is necessary to assume that the state statute is applicable to the entire transaction. The gravamen of the case, then, would turn on burdens imposed by the statute on interstate commerce, and this requires consideration of the various provisions of the statute.

The proposition may be stated as follows: If the state has the power to tax extra-territorial sales and to force the sellers to become its agents for the collection of the tax, the state would also have the power to prescribe the duties to be performed by its agents and to require them to comply with the statutory provisions which safeguard the collection of the tax and its remittance to the state. Turning then to the act, it will be seen that the provisions thereof in this respect are so drastic that they would place an onerous burden on interstate commerce, and, in some circumstances, would deter such commerce entirely.

Section 6 of the taxing statute provides:

> "It shall be the duty of every taxpayer required to make a return and pay any tax under this act to keep and preserve suitable records of the gross receipts or gross proceeds of sales taxable and nontaxable under this act, including such books of account and such analyses of sales as may be necessary to determine the amount of tax due hereunder, and all invoices, credit memoranda, refund slips, and other records of goods, wares, merchandise, and other subjects of taxation under this act as will substantiate and prove the accuracy of such returns. All such records shall remain in Arkansas and be preserved for a period of three (3) years, and shall be

open to examination at any time by the commissioner. In the event that such records are kept outside of the State of Arkansas in the usual course of business they shall be produced in the State of Arkansas upon proper demand by the Commissioner within a period of fifteen (15) days after receipt of such demand. * * *

"It shall also be the duty of every person who makes sales for resale to keep records of such sales which shall be subject to examination by the Commissioner or Revenue or by any of his duly authorized agents while engaged in checking or auditing the records of any person making such sale for resale. All such records of sales for resale shall remain in Arkansas and shall be preserved for a period of three (3) years, and shall be open to examination at any time by the Commissioner or by any of his duly authorized agents." (Appendix to petition, page 42.)

As is apparent, this section requires a non-resident merchant to keep a record of all sales made by him, not only those which are taxable under the act, but those which are not taxable, together with all invoices, credit memoranda, refund slips, and other records of goods, wares and merchandise that are the subject of taxation under the act. Moreover, the non-resident seller is required to produce all of his records in the State of Arkansas for examination by the state authorities whenever a demand for such production is made on him by the Commissioner of Revenues. Seemingly, it would necessarily follow that if non-resident merchants were required to keep their records in the manner prescribed by the statute, and produce them in Arkansas whenever a demand therefor be made, as a condition to the right to sell goods to Arkansas purchasers, they would probably prefer not to make the sales. Unless the volume of sales was ex-

tremely large the cost of keeping and sending such records to Arkansas for examination might exceed the profits. This would not only create a burden on interstate commerce, but would be an absolute deterent of such commerce.

Ten of thousands of residents of Arkansas purchase goods from mail order houses in St. Louis, Chicago and New York, who order by catalogue and to whom delivery is made by parcel post, or otherwise. If petitioner's contention be sound, these mail order houses must necessarily keep their records in compliance with the taxing statute, and must collect and remit the tax as the statute requires.

The taxing statute goes much further than indicated. Section 12 thereof provides that "it shall be unlawful for any taxpayer to engage or transact business within this state unless a resident permit or permits shall have been issued to him. Section 19 provides that "any taxpayer who continues to do business after the effective date of this act * * * without first obtaining a permit shall be guilty of a misdemeanor punishable by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment." (Appendix to petition, pages 51 to 57.)

It may be contended that these provisions would not be applicable to non-resident sellers; but this is just another way of saying that the taxing act is not applicable to them, for the act makes no distinction between local and non-resident sellers in this respect, and if it applies to the latter at all, it applies to them in its entirety. In

any event, the requirement of a permit to make taxable sales, and the provision that sales made without a permit shall constitute a crime punishable by fine or imprisonment or both would lay a prohibitive embargo on interstate commerce in its application to extra-territorial sellers.

Petitioner contends that the imposition of this burden on interstate commerce is justified by the decision of this court in *Felt & Tarrant Mfg. Co. vs. Gallagher*, 306 U. S. 62, 59 Sup. Ct. 376, in which it was held that the manufacturing company, an Illinois corporation, could be lawfully required to collect the California use tax. Therein, the manufacturer of comptomotors leased an office in California and employed a general agent in that state to negotiate sales of its machines in certain designated territory in the state. It was held that the statute which required the seller, in the circumstances of that case, to collect the tax for the benefit of the state imposed no unconstitutional burden on interstate commerce.

Petitioner apparently concedes that the State of Arkansas could not enforce the collection provisions of its taxing statute beyond its own border but further contends that the lack of power to enforce the statute extraterritorially is not a desideratum in measuring the statute with the yardstick of the commerce clause. In our opinion, this merely begs the question, for in effect it says that if the statute cannot be enforced beyond the border of the state it cannot impose a burden on interstate transactions. Obviously, then, if that were the case, no question would arise under the commerce clause. However, for the purpose of this suit it must be assumed that the statute is applicable to interstate commerce, and the

question really presented is whether or not it imposes an undue burden on that commerce.

POINT II. INSOFAR AS INTERSTATE COMMERCE IS CONCERNED, THERE CANNOT BE ANY VITAL DISTINCTION BETWEEN A LICENSE TAX OR A TAX OF ANY OTHER CHARACTER. IF EITHER CONSTITUTES A BURDEN ON COMMERCE, IT IS INVALID.

Counsel says that the doctrine announced by this court in *Crenshaw vs. Arkansas,* 227 U. S. 389, 33 S. C. 294, and cases of similar import, are inapposite here for the reason that such cases involved a license, or occupational, tax on solicitation of orders in interstate commerce. However, as we view it, if it be held that the levy of a tax on the privilege of soliciting orders to be subsequently fulfilled by shipment of goods from one state to another, in final fulfillment of the contract, which is but the initial step in such commerce, but which comprises an integral part of the whole, does in and of itself burden interstate commerce, then it ought to necesarily follow that any tax, or burden laid on the delivery thereof within the state—the final consummation of the transaction—would have the same effect. If, as said in the *Crenshaw case,* the "business" of soliciting orders, and the fulfillment of such orders, is interstate commerce, and the privilege of doing it cannot be taxed, then by the same token, if a privilege tax is laid on the solicitation would constitute a burden, any tax, privilege or otherwise, laid on the consummation of it by delivery would constitute a burden.

The decision in the *Berwind-White case* does not preclude application of the principle of the *Crenshaw case*

to the instant case. It may be conceded that by virtue of the *Berwind-White* decision, the rule deduced from the *Robbins* and *Crenshaw cases* is "narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate." Furthermore, "the actual and potential effect on the commerce of such a tax" was wholly wanting in the *Berwind-White case* for the obvious reason that the factual setting did not involve it. But, in the instant case, solicitation of such orders, under the aegis of the commerce clause, constituted the first and most important link in the chain, and formed the predicate for subsequent acceptance and fulfillment of the order, which is also protected, without let or hindrance on the part of the state, under the commerce clause. The point we endeavor to impress is that if the solicitation of the order, the subsequent fulfillment of which contemplates and requires interstate commerce, be protected, then, the acceptance and fulfillment thereof must likewise have protection, for, as said in the *First case*, supra:

> "Accordingly, when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the state cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purpose."

Likewise, when a corporation accepts an order for the sale of merchandise originating in a sister state, to make delivery of goods to the purchaser at the domicile of the corporation, the state of origin cannot, consistently with the limitation arising from the commerce clause, obstruct the attainment of that purchase.

Regulations promulgated by the commissioner (No. 16 —Act 154, and No. 270—Act 386) do not provide for the collection of the tax on merchandise, possession of which, actual, as distinguished from constructive, is obtained by purchaser at a point outside the state and thereafter by him brought into the state and used; and counsel for petitioner has continuously maintained that the tax may be made to apply only in those instances "where possession (physical) of the merchandise is obtained in this state by the purchaser and the merchandise is to be used in this state." In these circumstances, therefore, according to counsel, activities which involve (1) the purchase of merchandise in Memphis, followed by (2) taking of the actual physical possession thereof in Memphis, and (3) the immediate transportation of it into Arkansas by the purchaser, does not provide a "taxable event," within the purview of the taxing act. We presume the commerce clause provides the barrier. But, in any event, the distinction which he endeavors to draw and sustain rests wholly on what he deems the line of demarcation between a delivery of the actual physical possession to the purchaser in Memphis, followed by subsequent transportation by him into Arkansas, on the one hand, and a delivery by the seller to the carrier agent of the purchaser — constructive possession — on the other. The distinction seems rather more fanciful than real, and without bearing, force or effect when one endeavors to determine whether either transaction is interstate commerce.

POINT III. THE ARKANSAS SUPREME COURT HAS NOT DECIDED THE LOCAL QUESTIONS INVOLVED.

If, as counsel contends, "the tax is laid upon the purchaser for consumption," as we have heretofore contended, the tax would not be valid under Arkansas law, it being conceded that Arkansas does not have a law providing for a "use tax."

Moreover, Respondents have heretofore contended, and yet contend, (1) that the taxing statutes do not purport to cover extra-territorial sales; (2) that upon termination of the inter-state movement into Arkansas, any tax laid on the *right* of the purchaser (owner) to receive the property would violate the uniformity provision of the state constitution; and, (3) any tax in the nature of a "use tax" would not be valid under the state constitution. For reasons not disclosed the State Supreme Court pretermitted decision of these vital questions, and preferred to place the opinion entirely on the commerce clause. In these circumstances, therefore, if this court should hold that the tax does not offend under the commerce clause, then, in order that respondents may have their day in court on the very vital questions presented to, but not decided by, the State Supreme Court, remand should be made accordingly.

> *State of Minnesota vs. National Tea Co.*, 309 U. S. 551, 60 S. C. 676;
> *Schuylkill Trust Co. vs. Pennsylvania*, 302 U. S. 506, 58 S. C. 295.

This court, on remand of the *Berwind-White case*, ordered as follows:

> "In two instances already noted, respondents contracts with Austin Nichols and Company and with the New England Steamship Company called for delivery of the coal at points outside New York, in the one case f. o. b. at the mines in Pennsylvania, in the

other at the pier in Jersey City, N. J., and deliveries were made accordingly. Respondents asked the state courts to rule that the taxing act did not apply to these transactions, particularly because the enabling statute expressly prohibits the city from imposing a tax upon "any transaction originating and/or consummated outside of the territorial limits of the city." * * * This question the state courts left unanswered, the Court of Appeals resting its decision wholly on the constitutional ground.

"Upon the remand of this cause for further proceedings not inconsistent with this decision, the state court will be free to decide the state question, and the remand will be without prejudice to the further presentation to this court of any federal question remaining undecided here, if the state court shall determine that the taxing statute is applicable."

Respectfully submitted,

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January 18, 1944.

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SUPREME COURT OF THE UNITED STATES.

No. 311.—October Term, 1943.

Murray B. McLeod, Commissioner of Revenues of the State of Arkansas, Petitioner, *vs.* J. E. Dilworth Company and Reichman-Crosby Company.	On Writ of Certiorari to the Supreme Court of the State of Arkansas.

[May 15, 1944.]

Mr. Justice Frankfurter delivered the opinion of the Court.

We are asked to reverse a decision of the Supreme Court of Arkansas holding that the Commerce Clause precludes liability for the sales tax of that State upon the transactions to be set forth.

We take the descriptions of these transactions from the opinion under review. The ~~petitioners~~ respondents are Tennessee corporations with home offices and places of business in Memphis where they sell machinery and mill supplies. They are not qualified to do business in Arkansas and have neither sales office, branch plant nor any other place of business in that State. Orders for goods come to Tennessee ~~either~~ through solicitation in Arkansas by traveling salesmen domiciled in Tennessee, ~~or~~ by mail or telephone. But no matter how ~~the~~ an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short, we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas.

For such sales, the Supreme Court of Arkansas had held, in 1939, the State had no power to exact a sales tax, *Mann* v. *McCarroll*, 198 Ark. 628. The Arkansas legislation then in force was Act 154 of 1937. The transactions on which the Collector here seeks to tax extended over periods that bring into question Act 154 (extended by Act 364 of 1939) and a new Statute (Act 386 of 1941), known as the Gross Receipts Act. The Arkansas Su-

preme Court gave the Act of 1941 the same scope and significance as it attributed to the Act of 1937, that is, an act imposing a retail sales tax and not a use tax. In view of this construction, it adhered to its earlier decision in *Mann* v. *McCarroll,* finding nothing in our intervening decision in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, requiring a change in its constitutional views. 205 Ark. 780. To permit further examination of the complicated problems raised by the interplay of federal and state powers we brought the case here. 320 U. S. 728.

We agree with the Arkansas Supreme Court that the *Berwind-White* case presented a situation different from this case and that this case is on the other side of the line which marks off the limits of state power. A boundary line is none the worse for being narrow. Once it is recognized, as it long has been by this Court, that federal and state taxation do not move within wholly different orbits, that there are points of intersection between the powers of the two governments, and that there are transactions of what col~~loquially may be deemed~~ a single process across ~~state lines which~~ may yet be taxed by the State of their occurrence, "nice distinctions are to be expected". *Galveston, Harrisburg, &c. Ry. Co.* v. *Texas,* 210 U. S. 217, 225. The differentiations made by the court below ~~between this case~~ and the *Berwind-White* case are relevant and controlling. "The distinguishing point between the Berwind-White Coal case and the cases at bar ~~said the court below~~ is that in the Berwind-White Coal case the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ." 205 Ark. at 786. This, according to practical notions of what constitutes a sale which is reflected by what the law deems a sale, constituted a sale in New York and accordingly we sustained a retail sales tax by New York. Here, as the Arkansas Supreme Court continued, "the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey." Because the relevant factors in the two cases decided together with the *Berwind-White* case were the same as those in *Berwind-White*, the decision in that case controlled the two other cases. "In both cases the tax was imposed on all the sales of merchandise for which orders were taken within the city

and possession of which was transferred to the purchaser there. Decision in both is controlled by our decision in the *Berwind-White Company* case." *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70, 77. In *Berwind-White* the Pennsylvania seller completed his sales in New York; ~~and~~ in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.

It is suggested, however, that Arkansas could have levied a tax of the same amount on the use of these goods in Arkansas by the Arkansas buyers, and that such a use tax would not exceed the limits upon state power derived from the United States Constitution. Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as it. ~~Supreme Court so~~ emphatically found. A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. In view of the differences ~~between these transactions~~ in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States. That clause vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not in the States.

The difference in substance between a sales and a use tax was adverted to in the leading case sustaining a tax on the use after a sale had spent its interstate character: "A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable

to a tax upon the sale itself." *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583. Thus we are not dealing with matters of nomenclature even though they be matters of nicety. "The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution; neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it." *Wagner* v. *City of Covington*, 251 U. S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State.

A very different situation underlay *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. The Wisconsin Supreme Court and this Court were concerned with an exaction on a ~~the same~~ transaction which the Wisconsin Court described one way and we another. We looked behind the labels to the thing described, and the thing—taxation of the distribution of income earned in Wisconsin—did not offend the Federal Constitution. That case affords no ground for rejecting the deliberate choice of a State to impose a tax on a transfer of ownership ~~where the transfer was made beyond the State limits~~ and sustaining it, where the transfer was made beyond the State limits, as a use tax on that property because the State might, so far as the Federal Constitution is concerned, have enacted a use tax and such a use tax might have been collected on the enjoyment of the goods so sold. Such a mode of adjudication would imply a duty of excessive astuteness on our part to contract the area of free trade among the States.

Judgment affirmed.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice MURPHY concur, dissenting.

The present decision marks a retreat from the philosophy of the *Berwind-White* case, 309 U. S. 33. It draws a distinction between the use tax (*Felt & Tarrant Co.* v. *Gallagher*, 306 U. S. 62) and the sales tax which on the facts of this case seems irrelevant to the power of Arkansas to tax. And it is squarely opposed to *McGoldrick* v. *Felt & Tarrant Co.*, 309 U. S. 70, which should be overruled if the present decision goes down.

Felt & Tarrant Co. v. *Gallagher* involved a use tax. The State of the buyer (California) was allowed to exact the tax from the

Illinois seller for goods sold to California buyers though the seller's activities in California were not different in quality and hardly more numerous than the Arkansas activities of the Tennessee sellers in the present case. Though in some cases deliveries were made by the local agent for Felt & Tarrant, in others shipments were made by it from Illinois direct to the buyers in California. And in that case, as in the present case, the orders were accepted outside the State of the buyer and remittances were made direct to the out-of-state seller.

In *McGoldrick* v. *Felt & Tarrant Co.* we allowed New York City to collect its sales tax on sales which Felt & Tarrant made to New York purchasers under substantially the same course of dealing as obtained in case of the California use tax. Moreover, there were other transactions in *McGoldrick* v. *Felt & Tarrant* which were even closer to the sales in the present case. I refer to the sales to New York City buyers by a Massachusetts corporation (Du Grenier, Inc.) which was not authorized to do business in New York and which had no employee there. Another company, Stewart & McGuire, Inc., acted as its exclusive agent and solicited orders in New York City. The orders were forwarded to Massachusetts where they were accepted. Shipments were made by rail or truck (F. O. B. Haverhill, Mass.) to the purchaser in New York City, who paid the freight. Yet we allowed New York City to collect its sales tax on those transactions.

If the federal Constitution does not prohibit New York City from levying its sales tax on the proceeds of those interstate transactions or California from exacting its use tax at the final stage of an interstate movement of goods, I fail to see why Arkansas should be prohibited from collecting the present tax.

It is not enough to say that the use tax and the sales tax are different. A use tax may of course have a wider range of application than a sales tax. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. We stated as much in the *Berwind-White* case where, in speaking of the sales tax, we said (309 U. S. p. 49): "It does not aim at or discriminate against interstate commerce. It is laid upon every purchaser, within the state, of goods for consumption, regardless of

whether they have been transported in interstate commerce. Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce," citing use tax cases including *Henneford* v. *Silas Mason Co.* and *Felt & Tarrant Co.* v. *Gallagher.*

The sales tax and the use tax are, to be sure, taxes on different phases of the interstate transaction. We may agree that the use tax is a tax "on the enjoyment of that which was purchased." But realistically the sales tax is a tax on the receipt of that which was purchased. For as we said in the excerpt from the *Berwind-White* case quoted above, it is the "transfer of possession to the purchaser within the state" which is the "taxable event regardless of the time and place of passing title." And *McGoldrick* v. *Felt & Tarrant Co.* makes plain that the transfer of possession need not be by the seller, for in that case, as in the present one, deliveries were made by common carriers which accepted the goods F. O. B. at points outside the State. In terms of state power receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State. And there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.

It is no answer to say that the Arkansas sales tax may not be imposed because the out-of-state seller was "through selling" when the tax was incurred. That was likewise true of both the use tax cases, including *General Trading Co.* v. *State Tax Commission,* decided this day, and the sales tax decision in *McGoldrick* v. *Felt & Tarrant Co.* The question is whether there is a phase of the interstate transaction on which the State of the buyer can lay hold without placing interstate commerce at a disadvantage. There is no showing that Tennessee was exacting from these vendors a tax on these same transactions or that Arkansas discriminated against them. I can see no warrant for an interpretation of the Commerce Clause which puts local industry at a competitive disadvantage with interstate business. If there is a taxable

event within the State of the buyer, I would make the result under the Commerce Clause turn on practical considerations and business realities rather than on dialectics. If that is not done, I think we should retreat from the view that interstate commerce should carry its fair share of the costs of government in the localities where it finds its markets and adopt the views expressed in the dissent in the *Berwind-White* case.

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SUPREME COURT OF THE UNITED STATES.

Nos. 311, 441, 355.—October Term, 1943.

Murray B. McLeod, Commissioner of Revenue of the State of Arkansas, Petitioner, 311 vs. J. E. Dilworth Company and Reichman-Crosby Company.	On Writ of Certiorari to the Supreme Court of the State of Arkansas.
General Trading Company, a Corporation doing business as Minneapolis Iron Store, Petitioner, 441 vs. State Tax Commission of the State of Iowa.	On Writ of Certiorari to the Supreme Court of the State of Iowa.
International Harvester Company and International Harvester Company of America, Appellants, 355 vs. Department of Treasury of the State of Indiana, et al.	On Appeal from the Supreme Court of the State of Indiana.

[May 15, 1944.]

Mr. Justice Rutledge.

These three cases present in various applications the question of the power of a state to tax transactions having a close connection with interstate commerce.

In No. 311, *McLeod* v. *J. E. Dilworth Company*, Arkansas has construed its tax to be a sales tax, but has held this cannot be applied where a Tennessee corporation, having its home office and place of business in Memphis, solicits orders in Arkansas, by mail, telephone or sending solicitors regularly from Tennessee, accepts the orders in Memphis, and delivers the goods there to the carrier for shipment to the purchaser in Arkansas. This Court holds the tax invalid, because "the sale—the transfer of ownership—was

made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction." Though an Arkansas "use tax" might be sustained in the same situation, "we are not dealing with matters of nomenclature even though they be matters of nicety." And the case is thought to be different from the *Berwind-White* case, 309 U. S. 33, where New York City levied the tax, because, in the Arkansas court's language, "the corporation maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City. . . ."

On the other hand, in No. 441, *General Trading Company* v. *State Tax Commission*, Iowa applies its "use tax" to a transaction in which a Minnesota corporation ships goods from Minnesota, its only place of business, to Iowa purchasers on orders solicited in Iowa by salesmen sent there regularly from Minnesota for that purpose, the orders being accepted in Minnesota. This tax the Court sustains. While "no state can tax the privilege of doing interstate business, . . . the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which it may draw from a State to the upkeep of which it may be asked to bear its fair share. But a fair share precludes legislation obviously hostile or practically discriminatory toward interstate commerce. . . . None of these infirmities affects the tax in this case. . . ." And the foreign or nonresident seller who does no more than solicit orders in Iowa, as the Tennessee seller does in Arkansas, may be made the state's tax collector.

In No. 355, *International Harvester Company* v. *Indiana*, the state applies its gross income tax, among other situations, to one (Class D) where a foreign corporation authorized to do and doing business in Indiana sells and delivers its product in Indiana to out-of-state customers who come into the State for the transaction. The Court sustains the tax as applied.

I.

For constitutional purposes, I see no difference but one of words and possibly one of the scope of coverage between the Arkansas tax in No. 311 and the Iowa tax in No. 441. This is true whether the issue is one of due process or one of undue burden on interstate commerce. Each tax is imposed by the con-

suming state. On the records here, each has a due process connection with the transaction in that fact and in the regular, continuous solicitation there. Neither lays a greater burden on the interstate business involved than it does on wholly intrastate business of the same sort. Neither segregates the interstate transaction for separate or special treatment. In each instance therefore interstate and intrastate business reach these markets on identical terms, so far as the effects of the state taxes are concerned.

And in my opinion they do so under identical material circumstances. In both cases the sellers are "nonresidents" of the taxing state, foreign corporations. Neither seller maintains an office or a place of business there. Each has these facilities solely in the state of origin. In both cases the orders are taken by solicitors sent regularly to the taxing state for that purpose. In both the orders are accepted at the home office in the state of origin. And in both the goods are shipped by delivery to the carrier or the post in the state of origin for carriage across the state line and delivery by it to the purchaser in his taxing state.

In the face of such identities in connections and effects, it is hard to see how one tax can be upheld and the other voided. Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that "title passes" on delivery to the carrier in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that factor alone is a will-o'-the-wisp, insufficient to erux a due process connection from selling to consuming state and incapable of increasing or reducing any burden the tax may place upon the interstate transaction.

The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a "sales tax." Iowa calls hers a "use tax." This court now is committed to the validity of "use" taxes. *Henneford* v. *Silas Mason Company, Inc.*, 300 U. S. 577; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373. Similarly, "sales taxes"

on "interstate sales" have been sustained. In *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, such a tax applied by the state of the market was upheld. Compare *Banker Brothers Company* v. *Pennsylvania,* 222 U. S. 210; *Wiloil Corporation* v. *Pennsylvania,* 294 U. S. 169. Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435. The difference may be important for the scope of the statute's application, that is, whether it is intended to apply to some transactions but not to others that are within reach of the state's taxing power. It hardly can determine whether the power exists.

II.

The Court's different treatment of the two taxes does not result from any substantial difference in the facts under which they are levied or the effects they may have on interstate trade. It arises rather from applying different constitutional provisions to the substantially identical taxes, in the one case to invalidate that of Arkansas, in the other to sustain that of Iowa. Due process destroys the former. Absence of undue burden upon interstate commerce sustains the latter.

It would seem obvious that neither tax of its own force can impose a greater burden upon the interstate transaction to which it applies than it places upon the wholly local trade of the same character with which that transaction competes. By paying the Arkansas tax the Tennessee seller will pay no more than an Arkansas seller of the same goods to the same Arkansas buyer; and the latter will pay no more to the Tennessee seller than to an Arkansas vendor, on account of the tax, in absorbing its burden. The same thing is true of the Iowa tax in its incidence upon the sale by the Minnesota vendor. The cases are not different in the burden the two taxes place upon the interstate transactions. Nor in my opinion are they different in the existence of due process to sustain the taxes.

"Due process" and "commerce clause" conceptions are not always sharply separable in dealing with these problems. Cf. *e. g., Western Union Telegraph Company* v. *Kansas,* 216 U. S. 1. To some extent they overlap. If there is a want of due process to sustain the tax, by that fact alone any burden the tax imposes on the commerce among the states becomes "undue." But, though

overlapping, the two conceptions are not identical. There may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax as against due process objections. Yet it may fall because of its burdening effect upon the commerce. And, although the two notions cannot always be separated, clarity of consideration and of decision would be promoted if the two issues are approached, where they are presented, at least tentatively as if they were separate and distinct, not intermingled ones.

Thus, in the case from Arkansas no more than in that from Iowa should there be difficulty in finding due process connections with the taxing state sufficient to sustain the tax. As in the Iowa case, the goods are sold and shipped to Arkansas buyers. Arkansas is the consuming state, the market these goods seek and find. They find it by virtue of a continuous course of solicitation there by the Tennessee seller. The old notion that "mere solicitation" is not "doing business" when it is regular, continuous and persistent is fast losing its force. In the *General Trading* case it loses force altogether, for the Iowa statute defines this process in terms as "a retailer maintaining a place of business in this state."[1] The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer. There is no difference between the Iowa and the Arkansas situations in this respect. Both involve continuous, regular, and not intermittent or casual courses of solicitation. Both involve the shipment of goods from without to a buyer within the state. Both involve taxation by the state of the market. And if these substantial connections are sufficient to underpin the tax with due process in the one case, they are also in the other.

That is true, if labels are not to control, unless something which happens or may happen outside the taxing state operates in the

[1] Cf. Frene v. Louisville Cement Co., 134 F. 2d 511 (App. D. C.).

one case to defeat the jurisdiction, but does not defeat it in the other.

As I read the Court's opinion, though it does not explicitly so state, the Arkansas tax falls because Tennessee could tax the transaction and, as between the two states, has exclusive power to do so. This is because "the sale—the transfer of ownership—was made in Tennessee." Arkansas' relation to the transaction is constitutionally different from that of New York in the *Berwind-White* case, though both are the state of the market, because the Berwind-White Company "maintained its sales office in New York City, took its contracts in New York City and made actual delivery in New York City." This "constituted a sale in New York and accordingly we sustained a retail sales tax by New York." So here the company's "offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce . . ." The inevitable conclusion, it seems to me, is that the Court is deciding not only that Arkansas cannot tax the transaction, but that Tennessee can tax it and is the only state which can do so. To put the matter shortly, Arkansas cannot levy the tax because Tennessee can levy it. Hence "for Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

This statement of the matter appears to be a composite of due process and commerce clause ideas. If so, it is hard to see why the same considerations do not nullify Iowa's power to levy her tax in the identical circumstances and vest exclusive jurisdiction in Minnesota to tax those transactions. For in the Iowa case the selling corporation maintains its office and place of business in Minnesota, accepts the orders there, and the delivery, which is to carrier or post, is consummated, so far as the record shows, exactly in the manner it is made in the Tennessee-Arkansas transaction. If these facts nullify Arkansas' power to tax the transaction by vesting exclusive jurisdiction in Tennessee, it would seem *a fortiori* they would nullify Iowa's power and give Minnesota exclusive jurisdiction to tax the transactions there involved. Unless the sheer difference in the terms "sale" and "use," and whatever difference these might make as a matter of legislative selection of the transactions which are to bear the tax, are to control

upon the existence of the power to tax, the result should be the same in both cases.

Merely as a matter of due process, it is hard to see why any of the four states cannot tax the transactions these cases involve. Each has substantial relations and connections with the transaction, the state of market not less in either case than the state of origin. It "sounds better" for the state of origin to call its tax a "sales tax" and the state of market to name its tax a "use tax." But in the *Berwind-White* case the latter's "sales tax" was sustained, where it is true more of the incidents of sale conjoined with the location of the place of market than do in either No. 311 or No. 441. If this is the distinguishing factor, as it might be for selecting one of the two connected jurisdictions for exclusive taxing power, it is not one which applies to either of these transactions. The identity is not between the *Dilworth* case and *Berwind-White.* It is rather between *Dilworth* and *General Trading* with *Berwind-White* differing from both. And, so far as due process alone is concerned, it should make no difference whether the tax in the one case is laid by Arkansas or Tennessee and in the other by Iowa or Minnesota. Each state has a sufficiently substantial and close connection with the transaction, whether by virtue of tax benefits conferred in general police protection and otherwise or on account of ideas of territorial sovereignty concerning occurrence of "taxable incidents" within its borders, to furnish the due process foundation necessary to sustain the exercise of its taxing power. Whether it exerts this by selecting for "impingement" of the tax some feature or incident of the transaction which it denominates "sale" or "use" is both illusory and unimportant in any bearing upon its constitutional authority as a matter of due process. If this has any substantive effect, it is merely one of legislative intent in selecting the transactions to bear the tax and thus fixing the scope of its coverage, not one of constitutional power. "Use" may cover more transactions with which a state has due process connections than "sale." But whenever sale occurs and is taxed the tax bears equally, in final incidence of burden, upon the use which follows immediately upon it.

The great difficulty in allocating taxing power as a matter of due process between the state of origin and the state of market arises from the fact that each state, considered without reference

to the other, always has a sufficiently substantial relation in fact and in tax benefit conferred to the interstate transaction to sustain an exertion of its taxing power, a fact not always recognized. And from this failure, as well as from the terms in which statutes not directed specifically to reaching these transactions are cast, comes the search for some "taxable incident taking place within the state's boundaries" as a hook for hanging constitutionality under due process ideas. "Taxable incident" there must be. But to take what is in essence and totality an interstate transaction between a state of origin and one of market and hang the taxing power of either state upon some segmented incident of the whole and declare that this does or does not "tax an interstate transaction" is to do two things. It is first to ignore that any tax hung on such an incident is levied on an interstate transaction. For the part cannot be separated from the whole. It is also to ignore the fact that each state, whether of origin or of market, has by that one fact alone a relation to the whole transaction so substantial as to nullify any due process prohibition. Whether the tax is levied on the "sale" or on the "use," by the one state or by the other, it is in fact and effect a tax levied on an interstate transaction. Nothing in due process requirements prohibits either state to levy either sort of tax on such transactions. That Tennessee therefore may tax this transaction by a sales tax does not, in any proper conception of due process, deprive Arkansas of the same power.

III.

When, however, the issue is turned from due process to the prohibitive effect of the commerce clause, more substantial considerations arise from the fact that both the state of origin and that of market exert or may exert their taxing powers upon the interstate transaction. The long history of this problem boils down in general statement to the formula that the states, by virtue of the force of the commerce clause, may not unduly burden interstate commerce. This resolves itself into various corollary formulations. One is that a state may not single out interstate commerce for special tax burden. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 55-56. Nor may it discriminate against interstate commerce and in favor of its local trade. *Welton v. Missouri*, 91 U. S. at 275; *Guy v. Baltimore*, 100 U. S. 434; *Voight*

v. *Wright,* 141 U. S. 62. Again, the state may not impose cumulative burdens upon interstate trade or commerce. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434; *J. D. Adams Mfg. Co.* v. *Storen,* 304 U. S. 307. Thus, the state may not impose certain taxes on interstate commerce, its incidents or instrumentalities, which are no more in amount or burden than it places on its local business, not because this of itself is discriminatory, cumulative or special or would violate due process, but because other states also may have the right constitutionally, apart from the commerce clause, to tax the same thing and either the actuality or the risk of their doing so makes the total burden cumulative, discriminatory or special.[2]

In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or "use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.

The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a "use" tax and Tennessee and Minnesota a "sales" tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names, relevant to the problem created by the commerce clause, though not to that of "jurisdiction" under due process conceptions. And the difference would be no less substantial if the taxes levied by both the state of origin and that of market were called "sales" taxes or if, indeed, both were called "use" taxes.

[2] Cf. the opinion of the Chief Justice in Northwest Airlines, Inc. v. Minnesota, No. 33, decided this day.

441 The Iowa tax in No. [redacted] avoids this problem by allowing credit for any sales tax shown to be levied upon the transaction whether in Iowa or elsewhere. Clearly therefore that tax cannot in fact put the interstate transaction at a tax disadvantage with local trade done in Iowa or elsewhere.[3]

However, the Arkansas tax in No. [redacted] provides for no such
311 credit. But in that case there is no showing that Tennessee actually imposes any tax upon the transaction. If there is a burden or clog on commerce, therefore, it arises from the fact that Tennessee has power constitutionally to impose a tax, may exercise it, and when this occurs the cumulative effect of both taxes will be discriminatorily burdensome, though neither tax singles out the transaction or bears upon it more heavily than upon the local trade to which it applies. In short, the risk of multiple taxation creates the unconstitutional burden which actual taxation by both states would impose in fact.

In my opinion this is the real question and the only one presented in No. 311. And in my judgment it is determined the wrong way, not on commerce clause grounds but upon an unsustainable application of the due process prohibition.

Where the cumulative effect of two taxes, by whatever name called, one imposed by the state of origin, the other by the state of market, actually bears in practical effect upon such an interstate transaction, there is no escape under the doctrine of undue burden from one of two possible alternatives. Either one tax must fall or, what is the same thing, be required to give way to the other by allowing credit as the Iowa tax does, or there must be apportionment. Either solution presents an awkward alternative. But one or the other must be accepted unless that doctrine is to be discarded and one of two extreme positions taken, namely, that neither state can tax the interstate transaction or that both may do so until Congress intervenes to give its solution for the problem. It is too late to accept the former extreme, too early even if it were clearly desirable or permissible to follow the latter.

As between apportionment and requiring one tax to fall or allow credit, the latter perhaps would be the preferable solution. And in my opinion it is the one which the Court in effect, though not in specific statement, adopts. That the decision is cast more largely

[3] Cf. text *infra* at note 4 *et seq.*

in terms of due process than in those of the commerce clause does not nullify that effect.

If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of market rather than the state of origin.[4] The former is the state where the goods must come in competition with those sold locally. It is the one where the burden of the tax necessarily will fall equally on both classes of trade. To choose the tax of the state of origin presents at least some possibilities that the burden it imposes on its local trade, with which the interstate traffic does not compete, at any rate directly, will be heavier than that placed by the consuming state on its local business of the same character. If therefore choice has to be made, whether as a matter of exclusive power to tax or as one of allowing credit, it should be in favor of the state of market or consumption as the one most certain to place the same tax load on both the interstate and competing local business. Hence, if the risk of taxation by both states may be said to have the same constitutional consequences, under the commerce clause as taxation in actuality by both, the Arkansas tax, rather than the power of Tennessee to tax, should stand.

It may be that the mere risk of double taxation would not have the same consequences, given always of course a sufficient due process connection with the taxing states, that actual double taxation has, or may have, for application of the commerce clause prohibition. Risk of course is not irrelevant to burden or to the clogging effect the rule against undue burden is intended to prevent. But in these situations it may be doubted, on entirely practical grounds, that the mere risk Tennessee may apply its taxing power to these transactions will have any substantial effect in restraining the commerce such as the actual application of that power would have. In any event, whether or not the choice must be made now or, as I think, has been made, it should go in favor of Arkansas, not Tennessee.

For all practical purposes Indiana's gross income tax in No. 355 may be regarded as either a sales tax or a use tax laid in the

[4] Cf. Powell, New Light on Gross Receipts Taxes (1940) 53 Harv. L. Rev. 909; Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harv. L. Rev. 617; compare Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434; J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307.

state of market, comparable in all respects (except in words) to the Arkansas tax laid in No. 311 and to the Iowa tax imposed in No. 441, except that here the seller as well as the buyer does business and concludes the transaction in Indiana, the state of the market. This is clearly true of Classes C and E. It is true also of Class D, in my opinion, although the buyer there resided in Illinois but went to Indiana to enter into the transaction and take delivery of the goods. That he at once removed them, on completion of the transaction there, to Illinois, intended to do this from the beginning and this fact may have been known to the seller, does not take from the transaction its character as one entered into and completed in Indiana. Whether or not Illinois, in these circumstances, could impose a use tax or some other as a property tax is not presented and need not be determined. If the Arkansas and Iowa taxes stand, or either does, *a fortiori* the Indiana tax stands in these applications.

Accordingly, I concur in the decisions in Nos. 441 and 355, but dissent from the decision in No. 311.